I. ...ON FILED
JAN 16 2001

JAN 16 2001

No. 00-292

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN POTAWATOMI NATION,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA, SECOND DIVISION

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE SAN MANUEL SAN MANUEL BAND OF SERRANO MISSION INDIANS IN SUPPORT OF RESPONDENT; AMICUS CURIAE BRIEF OF THE SAN MANUEL BAND OF SERRANO MISSION INDIANS IN SUPPORT OF RESPONDENT; MOTION FOR LEAVE TO FILE

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Pursuant to Supreme Court Rule 37, the San Manuel Band of Serrano Mission Indians, a federally recognized Indian Tribe (hereinafter "Band") hereby moves this Court for an order granting leave to file the attached Brief of Amicus Curiae in support of respondent. Written consent to file this motion has been granted by the respondent Citizen Potawatomi Nation, and is filed herewith. Counsel for petitioner C & L Enterprises, Inc., refused to grant its consent, however, necessitating this motion.[1]

The San Manuel Band is a federally recognized Indian Tribe located in southern California. *See* 65 Fed. Reg. 13298, 13301 (March 13, 2000) (listing federally recognized Tribes). The Band has historically lacked the ability to raise governmental revenues through income taxation and other means typically used by state governments to fund necessary governmental programs including health, education, housing, roads, and water projects. It is only through the development of governmental projects that might otherwise be characterized as "commercial" that the Band has been able to exercise its sovereignty by raising revenue to implement governmental programs to improve its members' lives.

The Band has an interest in maintaining the well-established rules governing waivers of tribal sovereign immunity. For many years the law in the Ninth Circuit has clearly held that arbitration agreements using boilerplate language do not expressly and unequivocally waive tribal sovereign immunity. That rule is well-supported by this Court's precedents requiring that waivers of sovereign immunity be express and unequivocal, federal Indian policies

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1 The Tribe notes that as a federally recognized sovereign tribal government, it is a "similar entity" to the other governmental entities expressly enumerated in Supreme Court Rule 37(4). As such, the Tribe may be eligible to file an amicus brief without the consent of the parties or leave of Court, just as may towns, cities, counties, states, territories, and other governmental entities pursuant to Rule 37(4).

supporting tribal self-governance and economic self-sufficiency, and the federal government's trust and fiduciary duties to tribal governments.

For these reasons, the Band respectfully requests that the Court grant it leave to file the proposed amicus brief submitted herewith.

DATED: January 16, 2001

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INTERESTS OF AMICUS CURIAE

The amicus curiae San Manuel Band of Serrano Mission Indians files this brief in support of the respondent Citizen Potawatomi Nation, together with a motion for leave to file pursuant to Supreme Court Rule 37(2)b.

The San Manuel Band is a federally recognized Indian Tribe located in southern California. *See* 65 Fed. Reg. 13298, 13301 (March 13, 2000) (listing federally recognized Tribes). The Band has historically lacked the ability to raise governmental revenues through income taxation and other means typically used by state governments to fund necessary governmental programs including health, education, housing, roads, and water projects. It is only through the development of governmental projects that might otherwise be characterized as "commercial" that the Band has been able to exercise its sovereignty by raising revenue to implement governmental programs to improve its members' lives.

The Band has an interest in maintaining the well-established rules governing waivers of tribal sovereign immunity. For over a decade, the law in the Ninth Circuit has clearly held that arbitration agreements using boilerplate language do not expressly and unequivocally waive tribal sovereign immunity. That rule is well-supported by this Court's precedents requiring that waivers of sovereign immunity be express and unequivocal, federal Indian policies supporting tribal self-governance and economic self-sufficiency, and the federal government's trust and fiduciary duties to tribal governments.

For these reasons, the Band has a substantial interest in supporting the respondent Citizen Potawatomi Nation in urging the Court to affirm the decision below.[1]

SUMMARY OF ARGUMENT

The boilerplate arbitration clause here equivocates by its silence as to what judicial forum, if any, it grants jurisdiction to enforce an arbitration award. This arbitration clause would not expressly and unequivocally waive a state's sovereign immunity from suit in tribal court, were a state to execute such an agreement. Nor would the language at issue unquestionably manifest a state's consent to suit in federal court. The ambiguity as to judicial forum inherent in the arbitration clause is further highlighted by petitioner's necessary and express reliance on language outside the arbitration clause to cobble together an argument that the Citizen Potawatomi Nation waived its immunity. The settled rules by which courts evaluate purported waivers of tribal sovereign immunity are supported by bedrock notions of sovereignty, by the federal trust and fiduciary duties to Indian tribes, by federal Indian policies supporting tribal self-governance and economic self-sufficiency, and by this Court's recently reaffirmed deference to Congress. Finally, petitioner ignores the significant distinction between application of a law to a sovereign entity and a waiver of that sovereign's immunity from suit in the courts of a foreign jurisdiction.

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court affirm the Oklahoma Court of Civil Appeal's decision.

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[1] As required by Supreme Court Rule 37(5), counsel for the San Manuel Band note that they have authored this brief in whole.

ARGUMENT

I. The Boilerplate Arbitration Clause Here Equivocates By Its Silence As To What Judicial Forum, if any, It Grants Jurisdiction to Enforce an Arbitration Award

"Suits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). "It is settled that a waiver of sovereign immunity **cannot be implied but must be unequivocally expressed.**" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotes and citations omitted) (emphasis added). *See also United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969). The same exacting standard governs purported waivers of the states' sovereign immunity: they too must be "unequivocally expressed." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984).[2]

The boilerplate arbitration clause at issue here, supplied courtesy of the American Institute of Architects (hereinafter "AIA"), provides in pertinent part that judgment may be entered upon an arbitrator's award "in accordance with applicable law in any **court having jurisdiction thereof**," and that the arbitration agreement "shall be specifically enforceable under applicable law in any **court**

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[2] The rule that sovereign immunity can be surrendered only by express waiver enjoys ancient pedigree. *See Price v. United States and Osage Indians*, 174 U.S. 373, 375-76 (1899); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L.Ed. 991 (1857) ("[A]s this permission is altogether voluntary on the part of the sovereign, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted"). *See also Santa Clara Pueblo*, 436 U.S. at 58-59.

having jurisdiction thereof." JT. App. 46, Art. 10.8 (emphasis added).

The emphasized language begs the question at this case's heart: what court has jurisdiction? A sovereign's "interest in immunity encompasses not merely whether it may be sued, ***but where it may be sued.***" *Pennhurst State School & Hosp.*, 465 U.S. at 99 (emphasis added). This aspect of sovereign immunity means that a "State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts, and '[t]hus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court.'" *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990) (*quoting Atascadero State Hospital*, 473 U.S. at 241 (*citations omitted).* The amicus State of South Dakota expressly reserves this right in its Constitution: "The Legislature shall direct by law in what manner ***and in what courts*** suits may be brought against the state." So. Dak. Const. Art. III, sec. 27 (emphasis added).

Here, the AIA language does not specify a forum. It is entirely silent on this vital question.[3] The absence of a specified forum renders the AIA boilerplate arbitration clause

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[3] Petitioner may recognize that the lack of a specified judicial forum is fatal to its claim of an express and unequivocal waiver. It cites the 8th Circuit opinion in *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998), distinguishing the 8th Circuit's opinion in *American Indian Agricultural Credit v. Standing Rock Sioux*, 780 F.2d 1374 (8th Cir. 1985), on the grounds that in *Standing Rock* the contract did not specifically designate an arbitral forum. *See* Petitioner's Brief at 23. *See also* Amici Brief at 14 n. 8 (discussing *Hydaburg Coop. Assoc. v. Hydaburg Fisheries*, 826 P.2d 751, 755 (Alaska 1992), distinguishing the Ninth Circuit's decision in *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989), in part on the basis that the arbitration agreement in *Pan American* "did not subject themselves [sic] to the jurisdiction of either federal or state courts").

equivocal: it is not "clear; plain; capable of being understood in only one way," nor does it provide proof of the Potawatomi Tribe's consent to the jurisdiction of Oklahoma State courts in the "nature of mathematical certainty." *Black's Law Dictionary*, 1370 (5th ed. 1979) (defining "unequivocal").

In addition to state court, there are at least two additional common judicial forums that might typically be named in an arbitration clause: tribal court and federal court. Examining those alternative possibilities highlights the ambiguity residing in the AIA language at issue here.

A. The AIA Boilerplate Language Would Not Expressly and Unequivocally Express a State's Consent to Suit in Tribal Court, Were a State to Execute Such an Agreement.

The arbitration clause's lack of an express and unequivocal waiver is evident when we ask, hypothetically, whether it would expressly and unequivocally waive one of the amici states' sovereign immunity from the Potawatomi Tribal Court's jurisdiction.[4] Does the arbitration clause's language tell us with any degree of certainty that a state signatory thereto knowingly consented to the jurisdiction of the Potawatomi's Tribal Court? Plainly it does not.

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[4] The Respondent Potawatomi Nation has a tribal court system, created in part by its Constitution. The text of the Nation's Constitution, including its tribal court provisions, is available online in the Native American Constitution and Law Digitization Projects, coordinated by the University of Oklahoma Law Library and the National Indian Law Library, at http://thorpe.ou.edu/constitution/potawatomi/potawatconst.html. If the arbitration clause is construed to authorize jurisdiction in any court, deference to the existing Potawatomi tribal court would be appropriate. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987).

Petitioner suggests that "if a waiver of immunity does not refer to any particular court or place of adjudication, it is treated as applicable to all appropriate courts." Petitioner's Brief at 26 n. 3 (*quoting* Restatement (Third) of the Foreign Relations Law of the United States, section 456). Under this theory, any sovereign entity signing the AIA contract with a tribe, tribal entity or member, has waived its jurisdictional objections in all appropriate courts including tribal court. As to agreements involving states and other sovereign entities, such a result would be inappropriate because the form AIA language does not specify tribal court as a forum. Absent a clear statement of consent to a tribal court's jurisdiction, we would properly be reluctant to presume a non-Indian sovereign had consented thereto.

Just as state courts must honor tribal sovereign immunity, so too must tribal courts honor the states' common law sovereign immunity. *See, e.g., Montana v. Gilham*, 127 F.3d 897, 900-01 (9th Cir. 1997). This is true even when the state has waived immunity in its own courts. *See id.* And while tribes are not immune from suits by the United States, the United States remains immune from suit in tribal court. *See, e.g., United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986). *Cf. United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (United States can "override" state's sovereign immunity).

In sum, this arbitration clause's ambiguous and equivocal nature is highlighted by the fact that it would not express a state's waiver of its sovereign immunity from suit in tribal court. Given that conclusion, we should not read it to submit the Citizen Potawatomi Nation to the jurisdiction of the Oklahoma State courts.

B. The AIA Boilerplate Language Would Not Expressly and Unequivocally Manifest a State's Consent to Suit in Federal Court.

The AIA language does not reveal whether a sovereign signatory thereto intended to submit itself to federal court jurisdiction. Under this Court's precedents, a state's execution of such a contract would not waive the state's sovereign immunity. Nowhere is the point more clearly illustrated than in this Court's decision in *Kennecott Copper Corp. v. State Tax Com'n*, 327 U.S. 573 (1946).

Kennecott Copper was an action by mining companies to recover taxes from the Utah State Tax Commission. The case presented the question of whether the State of Utah had waived its sovereign immunity from tax refund suits in the federal courts. Utah statutes provided that a taxpayer could pay under protest any tax levied and then "'bring an action ***in any court of competent jurisdiction ... against the state*** ... to recover said tax ....'" *Kennecott Copper Corp.*, 327 U.S. at 575 n. 1 (*quoting* Utah Code Anno. 80—11—11 (1943)) (*emphasis added*). The emphasized language is significant for it is nearly identical to the language found in the AIA arbitration clause at issue in this case. *See* JT. App. 46, Article 10.8 ("law ***in any court having jurisdiction thereof***") (emphasis added).

The rule then, as now, was that a "clear declaration of a state's consent to suit against itself in the federal court on fiscal claims is required." *Id.* at 577. The Court explained that "[t]he reason underlying the rule ... is the right of a state to ***reserve for its courts*** the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances." *Id.* at 577 (emphasis

added). The Court concluded that "Utah has not consented to be sued ... in the federal courts ...." *Id.* at 576.[5]

Just as the Utah statute's reference to a "court of competent jurisdiction" did not expressly and unequivocally waive its sovereign immunity, so too does the AIA boilerplate arbitration clause fail to expressly and unequivocally articulate the Potawatomi Nation's consent to the jurisdiction of Oklahoma State courts. As this Court was unwilling to find a waiver of state sovereign immunity by implication in the Utah statutes, so too should this Court decline to imply a waiver of tribal sovereign immunity here.

The amici states candidly agree with this analysis. They concede, as they must, that "[o]f course, the arbitration clauses in this case would have no effect on a state's Eleventh Amendment immunity from suit in federal court unless the arbitration clause evidenced the state's intent to subject itself to the jurisdiction of the federal courts." States' Amici Brief at 17 n. 11 (emphasis added).[6] In other words,

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[5] The mining companies argued, *inter alia*, that the phrase "court of competent jurisdiction" had "long been construed in the federal statutes as including both state and federal courts." *Kennecott Copper Corp.*, 327 U.S. at 578. But this Court correctly noted that federal statutes granting jurisdiction to "courts of competent jurisdiction" for the "benefit of litigants other than the United States are not persuasive as to the intent of a state to consent to suits in federal court." *Id.* at 579. Similarly here, the AIA form drafters' intent to subject disputes to "any court having jurisdiction thereof" is not persuasive as to the intent of a tribal government to consent to suit in the Oklahoma State courts.

[6] Given the amici states' concession that the arbitration clause does not clearly express an intent to submit to federal court jurisdiction, their assertion that "[t]here is nothing ambiguous or unclear about the terms of the arbitration clause," States Amici Brief at 19, is patently wrong. As the states themselves concede, the arbitration clause is ambiguous and unclear as to the judicial forum in which

the amici states recognize that the generic arbitration clause here, which does not clearly evidence a consent to federal court jurisdiction, would not expressly and unequivocally waive state sovereign immunity. Yet this Court's standards for assessing waivers of both state and tribal sovereign immunity are functionally identical. "We have insisted, however, that the State's consent be **unequivocally expressed**." *Pennhurst State School & Hosp.*, 465 U.S. at 99 (emphasis added).[7] As noted above, waivers of tribal immunity "cannot be implied but must be **unequivocally expressed**." *Santa Clara Pueblo*, 436 U.S. at 58 (emphasis added).[8]

In sum, this arbitration clause's ambiguous and equivocal nature is again highlighted by the fact that it would not express a state's waiver of its sovereign immunity from suit in federal court. Given that conclusion, this Court should not read it to submit the Citizen Potawatomi Nation to the jurisdiction of the Oklahoma State courts.

C. Petitioner's Express Reliance On Language Outside the Arbitration Clause Confirms the Clause's Ambiguity.

Despite the lack of a specified judicial forum in the AIA arbitration clause, petitioner and the amici states argue as if the boilerplate language referred to Oklahoma Courts. For example, C&L claims that "assuming sovereign immunity had attached, it was expressly waived by the

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arbitration may be compelled or an arbitrator's award confirmed.

[7] See also *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). See *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (requiring a "clear declaration"); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

[8] Similarly, waivers of federal sovereign immunity "are not implied …." *College Savings Bank*, 527 U.S. at 682 (*citing United States v. King*, 395 U.S. 1, 4 (1969)).

Potawatomi's agreement to arbitration and consent to enforcement of any arbitration award in the Oklahoma state courts." Petitioner's Brief at 9.[9] The only way to find tribal consent to Oklahoma State Courts is by an implied reference and incorporation of Oklahoma statutory arbitration rules. C&L's assumption – though crucial to its argument -- violates this Court's clearly established rule against finding waivers of sovereign immunity by implication. *See College Savings Bank*, 527 U.S. at 682 (no implied waivers of state sovereign immunity); *Pennhurst*, 465 U.S. at 99 (same); *Santa Clara Pueblo*, 436 U.S. at 58 (no implied waivers of tribal sovereign immunity); *King*, 395 U.S. at 4 (no implied waivers of federal sovereign immunity).

Petitioner expressly relies on the operation of Oklahoma State law to imply a waiver of tribal immunity: "By operation of the Oklahoma Uniform Arbitration Act, and by the terms of the Contract and arbitration agreement, jurisdiction was properly exercised by the Oklahoma State Court." Petitioner's Brief at 17 (citation omitted); *see also id.* at 2-4 (*quoting* Okla. Stat. Tit. 15 secs. 802, 811-13 as "statutory provisions involved" in the case, pursuant to Supreme Court Rule 24(f)).

If the arbitration agreement contained an express and unequivocal waiver of tribal sovereign immunity, petitioner would not need to rely on "operation of the Oklahoma" statutes. That they necessarily rely so heavily on that state statutory structure, external to the AIA arbitration clause at issue, confirms the lack of any express and unequivocal waiver of tribal sovereign immunity.

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[9] *See also* States' Amici Brief at 10 ("A tribe may clearly express its intent to waive its immunity by stating in a contract, "If the tribe breaches the contract, you may sue us in state district court"); *id.* at 19 ("The tribe unequivocally expressed its agreement to be sued for breach of contract in a non-tribal forum"); *id.* at 5 n. 2; *id.* at 9.

II. The Well-Settled Rules of Tribal Sovereign Immunity Are Well-Supported by Bedrock Notions of Sovereignty, by the Federal Trust and Fiduciary Duties to Indian Tribes, by Federal Indian Policy, and by Deference to Congress

Petitioner and the amici states suggest this case as a vehicle for diminishing the scope of tribal sovereign immunity by substantially slackening the standard for finding a waiver thereof.[10] But their briefs ignore entirely the historical basis for sovereign immunity, to which the amici states dearly cling.[11]

Alexander Hamilton observed: "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption as one of the attributes of sovereignty is now enjoyed by the government of every state in the union." The Federalist No. 81, p. 548-49 (J. Cooke ed.1961). Chief Justice John Marshall believed that it "is not rational to suppose that a sovereign power should be dragged before a court." 3 Elliot, Debates in the Several State Conventions on the Adoption of

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[10] *See, e.g.*, Petitioner's Brief at 19 n. 2 ("this Court may determine that a less strict standard for waiver by Indian tribes is appropriate"); States' Amici Brief at 8 ("tribal immunity for commercial enterprises serves no legitimate purpose"); *id.* at 10 ("[t]he weak foundation for tribal immunity strongly recommends a relaxed standard for evaluating the validity of a claimed waiver of immunity").

[11] *See, e.g.*, Nebraska Rev. Stat. Sec. 81-8,297 ([n]othing [in the Nebraska State Miscellaneous Claims Act] shall be construed to be a waiver of the sovereign immunity of the state beyond what is otherwise provided by law"); Alabama Const. Art. 1, sec. 14 ("Alabama shall never be made a defendant in any court of law or equity"); Arkansas Const. Art. 5, sec. 20 ("Arkansas shall never be made a defendant in any of her courts"); South Dakota Const. Art. III, sec. 27 ("The Legislature shall direct by law in what manner and in what courts suits may be brought against the state").

the Federal Constitution 555 (2d ed. 1863). "Indian tribes have been recognized, first by the European nations, later by the United States, 'as distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.) (*quoting Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519, 8 L.Ed. 483 (1832)) (hereinafter "Cohen").[12] Petitioner and the amici states ignore these bedrock principles of sovereignty.

Additionally, petitioner and the amici states also ignore the United States' trust and fiduciary obligations to Indian tribal governments and Indian people. They disregard clearly-established federal Indian policies supporting tribal self-determination, self-reliance and economic self-sufficiency. Finally, they neglect this Court's recent articulation of the wisdom of deferring to Congress in this area of plenary federal power. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

This Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *U.S. v. Mitchell*, at 225 (1983). *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). For close to two centuries "[t]his principle has long dominated the Government's dealings with Indians." *Mitchell*, 463 U.S. at 225.[13] This Court's decisions require

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[12]Cohen's work is widely recognized as the premier authority on federal Indian law. See, e.g., *County of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992); *Blatchford v. Native Village of the Noatak and Circle Village*, 501 U.S. 775, 793 (1991); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 435 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

[13] See, e.g., *United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States v. Candelaria*, 271

the United States' trust obligations to Indian tribes be exercised according to the strictest fiduciary standards. *See United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The trust obligation extends to all federal actions. *See Seminole Nation*, 316 U.S. at 297.

To relax the rule requiring that waivers of tribal sovereign immunity be express and unequivocal, as petitioner and the amici states suggest, would be "an act of confiscation," of tribal sovereignty, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 219, 229 (1919), and would be inconsistent with the federal government's trust and fiduciary duties to tribes.

Indian tribes posses immunity because they are sovereigns predating the Constitution, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940); *see Turner v. United States*, 248 U.S. 354, 357-58 (1919), and because this vital aspect of sovereignty is necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy. *See American Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); Cohen, *supra*, at 324-28; Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1073 (1982).

Since the end of the termination era,[14] Congress has consistently voiced is strong support for tribal self-

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U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*,185 U.S. 373, 396 (1902); *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)).

[14] President Nixon's 1970 statement on Indian affairs inaugurated the current direction of federal Indian policy. *See* 116 Cong. Rec. 23258. He noted the termination policy's failure, stressed the continuing importance of the trust relationship between the federal government and tribes, and

determination and economic self-sufficiency. These policies are embodied in a variety of federal statutes including the Indian Financing Act of 1974, 25 U.S.C. §§ 1451, *et seq.*, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701, *et seq.* The diminution of tribal sovereign immunity petitioner and the amici states suggest is directly adverse to these well-established federal Indian policies. By slackening the standard for evaluating purported waivers of tribal sovereign immunity, their suggestion would subject more tribal governments to suit in state and federal courts against their will and would correspondingly diminish "the right of a [tribe] to reserve for its courts the primary consideration and decision of its own ... litigation ... [which has a] direct impact ... upon its finances." *Kennecott Copper Corp.*, 327 U.S. at 577.

In *Kiowa Tribe of Oklahoma*, this Court noted that, while it has taken a leading role in "drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation." *Id.* at 759.[15] This deference acknowledged that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id.* Congress' ability "to address the issue by comprehensive legislation counsels some caution by us in this area." *Id.* Because Congress has "'occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with ... or to limit,'" tribal immunity, the fact that Congress "has not yet done so" continues to warrant judicial deference. *Id.* (*quoting Potawatomi*, 498 U.S. at 510).

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advocated a legislative program to support tribal governments in managing their own affairs and strengthening their autonomy. *See id.*

[15] The Court cited by way of example *Santa Clara Pueblo*, 436 U.S. at 58, and its discussion of the Indian Civil Rights Act's abrogation of tribal sovereign immunity from habeas corpus actions.

Petitioner and the amici states fail to identify any persuasive reason for this Court to revisit its case law regarding tribal sovereign immunity, when just two years ago the court plainly stated that "we decline to revisit our case law and choose to defer to Congress." *Kiowa*, 523 U.S. at 760.

III. Petitioner Ignores the Distinction Between Application of a Law to a Sovereign and Waiver of that Sovereign's Immunity

Petitioner and the amici states argue that the arbitration clause is meaningless if a waiver of tribal sovereign immunity consenting to Oklahoma State court jurisdiction is not implied. This argument misses the mark for two reasons. First, as noted above, it is directly contrary to this Court's well-settled precedents holding that waivers of sovereign immunity – federal, state and tribal – must be express and not implied. *See College Savings Bank*, 527 U.S. at 682 (state); *Pennhurst*, 465 U.S. at 99 (same); *Santa Clara Pueblo*, 436 U.S. at 58 (tribal); *King*, 395 U.S. at 4 (federal).

Second, they ignore (or fail to comprehend) that the potential application of state law – in this case Oklahoma's arbitration act – is not synonymous with a waiver of sovereign immunity. In *Kiowa Tribe of Oklahoma*, this Court upheld tribal sovereign immunity notwithstanding "cases allowing States to apply their substantive laws to tribal activities ...." 523 U.S. at 755. The Court noted its decisions recognizing that under certain circumstances "a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country." *Id.*[16] "To say substantive state laws apply to off-reservation conduct,

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[16] See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

however, is not to say that a tribe no longer enjoys immunity from suit." *Id.*

For example, in *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991), the Court held that "while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes." *Kiowa*, 523 U.S. at 755. The Court's point, which is lost on Petitioner and the amici states here, is that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.*; *see Citizen Band Potawatomi*, 498 U.S. at 514. *See also Employees of the Department of Public Health & Welfare, Missouri v. Department of Public Health & Welfare, Missouri*, 411 U.S. 279, 282-83 (1973) (Fair Labor Standards Act amended to include states as employers, but did not abrogate state sovereign immunity).

Thus, even if Oklahoma's statutory arbitration program were deemed to apply to the Citizen Potawatomi Nation, that would not alone subject the Tribe to suit in Oklahoma State court. Petitioner would still need to have the express and unequivocal waiver of the Tribe's sovereign immunity that is lacking here.

CONCLUSION

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court affirm the Oklahoma Court of Civil Appeal's decision.

Respectfully submitted,

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